Top 12 Significant, Curious, or Downright Fascinating Fiduciary Cases of 2012*

At least, it seems to us. Your mileage may vary.

Dana G. Fitzsimons Jr.
Bessemer Trust
Atlanta, Georgia
fitzsimons@bessemer.com

Turney P. Berry
Wyatt Tarrant & Combs LLP
Louisville, Kentucky
tberry@wyattfirm.com

Gerard G. Brew
McCarter & English
Newark, New Jersey
gbrew@mccarter.com

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A. THE TOP 12 OF ’12.

1. ***Windsor v. United States,* Docket No. 12-2335-cv(L) (October 22, 2012).** The Second Circuit Court of Appeals declares the Defense of Marriage Act unconstitutional in a case involving the estate tax marital deduction.

   a. Edie Windsor and Thea Spyer started a committed relationship in 1962. In 1993, they registered as domestic partners under New York law. They were married in Canada in 2007. Thea died in 2009, naming Edie as her executor and leaving her estate to Edie.

   b. Edie filed the estate tax return for Thea’s estate and claimed the marital deduction. The IRS denied the deduction on the basis of DOMA. Edie paid the estate tax and sued for a refund in New York federal court.

   c. The federal district court found in Edie’s favor and held that DOMA was unconstitutional, and ordered a refund of $363,000 in estate taxes.

   d. The Department of Justice filed a notice of appeal to the Second Circuit as a nominal defendant (even though the DOJ had announced it would not defend DOMA, the DOJ notices the appeal so that a group from the U.S. House of Representatives could pursue the appeal).

   e. A divided Second Circuit held that DOMA was unconstitutional on the grounds that: (1) DOMA is subject to intermediate scrutiny under the Equal Protection Clause; (2) DOMA does not withstand this test and is therefore unconstitutional.

   f. After initially seeking an appeal to the U.S. Supreme Court, on November 5, 2012, the group from the U.S. House filed a supplemental brief with the U.S. Supreme Court asking the court to deny the petition for appeal. The U.S. House group would prefer that the Court consider the constitutionality of DOMA through the appeal of the *Golinski* case which involved enrollment of same-sex spouse in a health benefit plan.

   g. On December 7, 2012, the U.S. Supreme Court agreed to hear the case.

2. ***Matter of Carolyn S. Burford*, Tulsa County, Oklahoma District Court (October 9, 2012).** An Oklahoma district court has surcharged a bank trustee for $18 million in damages, plus costs and punitive damages to be later determined, in connection with the sale of oil company stock subject to a retention clause, purchasing variable prepaid forward contracts for the trust from its affiliates that resulted in the sale of other oil company stock subject to a retention clause, and other actions that favored the current beneficiary (who was also a co-trustee but not held responsible by the court) to the detriment of the remainder beneficiaries.

a. W.G. Skelly (the founder of Skelly Oil) and Gertrude Skelly created a trust in 1955 to provide net income to their daughter, Carolyn, for her lifetime, then net income to their granddaughter, Ann, for her lifetime. The trust required two trustees – one corporate trustee and one individual trustee. The trust terms provided for the distribution of assets at Ann's death to an Oklahoma church and to Ann's surviving children, Carolyn and Marianne.

b. The trust was originally funded with Skelly Oil stock and Socony Mobil stock. The trust included a retention clause that provided as follows:

> *Because of the high regard which the Grantors hold for the common stocks placed in this trust as an investment, they specifically recommend that, except for unusual circumstances, the Trustee retain all such stocks throughout the term of the trust and regardless of whether or not such retention may appear to offend against what might ordinarily be considered a sound trust investment practice and the usual principles of investment diversification.*

c. Ann became the income beneficiary upon her mother's death in 1996. From 1997 forward, Ann (who was at that time age 60 years old) suffered from physical impairments that required live-in help, and also was diagnosed with cognitive impairment and limited comprehension. The trust was Ann's primary source of income from 1998 forward. Ann had a social relationship with two employees of the bank serving as corporate trustee, and eventually named the bank employees as her attorneys-in-fact and executor.

d. All of the original stocks in the trust were retained until 1984. In 1984, the trustees sold the Skelly Oil stock (which had been converted to Getty Oil stock by merger) because of a 20% premium offered by Texaco, which the trustees concluded was an "unusual circumstance" that permitted the sale under the retention clause. In 1998, the Socony stock was exchange for Exxon stock through mergers. The bank repeatedly recommended diversification of the oil stocks, but Ann and the individual co-trustee resisted.

e. The individual co-trustee resigned in 1999 and recommended that Ann's daughter, Carolyn, be appointed as successor co-trustee. Rather, pursuant to authority in the trust terms, the bank and Ann appointed Ann as successor co-trustee. Thereafter, Ann requested an increase in her annual trust income to $500,000, and the bank agreed (the court found that he bank did not verify Ann's need for the additional income). The bank employees suggested selling the Exxon stock, Ann agreed, and $2 million in Exxon stock was sold with the proceeds invested in the bank's municipal bond fund. The court found that the sale of stock was inconsistent with the retention provision. The remainder beneficiaries were not informed of the sale.

f. In 2000, the bank approached Ann about using variable prepaid forward contracts (VPFs) with the trust to increase Ann's income. The court found the VPFs complex and difficult to understand, and not suitable for the trust because of risks and costs to the trust. These were the first VPFs ever used by the bank in a trust. The court found that the written presentation mailed by the bank to Ann about the VPFs did not adequately disclose the costs, how the bank would benefit from the VPFs, and the risks. Ann signed off

on the VPFs without consulting her own advisors or counsel. The bank did not inform Ann that the VPFs could result in the sale of the Exxon stock. Neither trustee informed the remainder beneficiaries about the VPFs. Only one of the 11 VPFs were done with a party not affiliated with the bank. The loan proceeds from the VPFs were invested primarily in the bank's municipal bond fund.

g. By 2000, 75% of the Exxon stock was pledged under the VPFs. By 2003, 100% of the Exxon stock was pledged under the VPFs. If the trust had not entered into the VPFs and sold Exxon stock in 1999, the trust would have had $23 million in Exxon stock (344,504 shares) by 2006. In 2007, almost 20,000 shares of Exxon stock were surrendered to partially settle the VPFs. According to expert testimony at trial, the bank earned as much as $2 million in profit from the VPFs. The bank provided incentives to employees to generate revenue.

h. In 2000-2002, the bank used its power to adjust between income and principal to make distributions to Ann that exceeded trust net income. Later, the bank restored $1.6 million to the trust for the income overdrafts. In 2004, the bank proposed converting the trust to a unitrust to deal with Ann's income demands, and petitioned the court for the conversion, but both Ann and her children disapproved and the trust was not converted to a unitrust.

i. In 2001, the bank petitioned and obtained a court order that fees paid to the bank for services in connection with options and derivative products and the sale of stock to the bank or its affiliates would not violate any self-dealing rules.

j. At Ann's request, Ann was replaced as co-trustee in 2005 by a new individual co-trustee. The new co-trustee prepared a report that raised several criticisms of the administration of the trust. Later that same year, the new co-trustee resigned, conditioned on appointment of a successor co-trustee. The bank requested that his resignation be effectively immediately, and the co-trustee complied, leaving the trust without a co-trustee. Acting without a co-trustee, the bank then transferred 66,666 shares of Exxon stock to itself on the expiration of one of the VPFs.

k. That same year, Carolyn asked the bank to raise cash to settle one of the VPFs and resign as co-trustee. The bank declined to settle the VPF, and instead rolled it over. Carolyn was appointed as co-trustee in 2006. Carolyn and Ann repeatedly requested cash settlement of the VPFs so the trust could retain some Exxon stock, but the bank determined that the VPF be stock settled and in 2006 transferred 81,140 shares of Exxon to itself.

l. In 2007, the court ordered the transfer of the trust assets to a new corporate trustee. At that time, the trust had only 29,571 shares of unpledged Exxon stock remaining. The successor bank trustee preserved an additional 114,407 shares by cash settling the final VPF. The court was highly critical of the adequacy of the bank's records.

m. Without analysis or discussion, the court held that the choice of law provision in the trust was unenforceable, and rendered its decision under Oklahoma law (including the Oklahoma Trust Act – Oklahoma has not enacted the UTC).

n. The district court concluded that the trustee had breached its fiduciary duties as co-trustee, and had been “grossly negligent and reckless in the administration of the trust,” on the following grounds:

(i) Failing to inform the remainder beneficiaries about the sale of stock to invest in the VPFs.

(ii) The bank’s recommendation to diversify and Ann’s requests for income were not “unusual circumstances” that supported deviation from the retention clause.

(iii) Distributing principal to Ann through the VPFs where the trust provided for only net income, without petitioning the court to modify the trust or obtaining the consent of all of the beneficiaries.

(iv) Encumbering the trust assets as security for the VPFs without the specific power to borrow in the trust instrument.

(v) Selling the Exxon stock and using VPFs for the Exxon stock in violation of the retention clause.

(vi) The trust terms waived the duty to diversify and relived the trustees from any liability for the retention of the Exxon stock.

(vii) Rather than investing the proceeds from the VPFs in a range of investments, investing almost exclusively in funds from which the bank earned fees.

(viii) Failing to investigate and inform the beneficiary of the risks and costs of the VPFs, or conduct a cost comparison among products considered for the trust portfolio.

(ix) Failing to establish that the VPFs were suitable for the trust or that the pricing was fair to the trust.

(x) Failing to verify Ann’s need for additional income.

(xi) Failing to have a plan to invest the proceeds of the VPFs to cover the high costs.

(xii) Abusing the power to adjust, and not requiring Ann to release her power to adjust as co-trustee due to a conflict of interest.

(xiii) Failing to consider the tax consequences of the VPFs and incurring substantial capital gains to settle the VPFs.

(xiv) Administering the trust for its own benefit (through higher fees than most investments, interest charges, and the sale of the Exxon stock to its own securities department) and for the benefit of its employees through an employee sales incentive program. The court found that bank employees were encouraged to target the trust for the purchase of VPFs.

(xv) Entering into self-dealing transactions without informed waivers by the beneficiaries.

(xvi) Investing the proceeds of the VPFs in its own products and charging fees in addition to the trustee fees that amounted to "double dipping" and was "inherently unreasonable".

(xvii) Failing to balance the interests of the beneficiaries in view of the intent of the settlors.

(xviii) Breaching its duties to its co-trustee by not providing relevant material facts and adequate disclosure, and failing to consult and obtain informed consent to actions.

(xix) Failing to inform the beneficiaries about Ann's conflict of interest as trustee, failing to address the conflict, and failing to pursue court approval of the VPFs.

(xx) By recommending or agreeing to Ann's appointment as co-trustee where she lacked qualifications to serve and had a conflict of interest.

(xxi) Providing inadequate account statements to Ann and not issuing corrected statements, and failing to inform Ann about the impact of the VPFs on the trust.

(xxii) Failing to adequately account for the trust.

o. The court disregarded the prior court order approving certain fees and sales in reaching its decision on the grounds that it did not address the VPFs, was backwards looking rather than forward looking, and because stock was not delivered to the bank through the VPFs until after the court order was entered.

p. The court did not hold Ann responsible for any of the perceived breaches of trust due to her lower standard of care as a lay person, her reliance on the bank, and because the court found that the bank should not have allowed her to participate in decisions due to her conflict of interest and lack of understanding, and because of the bank's duty to prevent its co-trustee from committing a breach of trust.

q. The court awarded actual damages against the bank for $18,122,644 (the cost to restore 220,122 shares of Exxon stock to the trust), along with (1) the attorneys fees incurred by the trust and the beneficiaries, (2) the reasonable fiduciary compensation owed to Carolyn as co-trustee for her service to the trust, and (3) punitive damages to be later determined after a hearing on the "financial condition of the bank."

r. The corporate trustee has already indicated that it will appeal the decision. There are likely to be several issues on appeal. The decision raises several interesting questions including:

(i) Whether the court properly disregarded the choice of law provision in the trust and applied Oklahoma law:

(ii) Whether the court correctly construed the retention clause as a mandatory sale restriction and not a precatory request.

(iii) Whether the court correctly absolved the beneficiary/co-trustee from any responsibility for the perceived breaches of duty.

(iv) The propriety of the punitive damage award.

(v) Whether the court properly disregarded the prior court order approving fees and sales of stock to bank affiliates.

(vi) The calculation of actual damages.

3. ***Matter of Knox, 2010 NY Slip Op 52234U* (February 24, 2010); *2010 NY Slip Op 52251U* (November 24, 2010); 2012 N.Y. App. Div. LEXIS 4880 (June 19, 2012)**. Surrogate's court surcharges trustee for over $21 million for not diversifying investments and taking investment directions from a non-fiduciary family member. The appellate division largely reverses the surcharge on appeal.

a. Seymour Knox II (Mr. Knox) created a trust under a trust agreement in 1957 for the benefit of his son Seymour Knox III (Seymour), with a predecessor to HSBC Bank as sole trustee. The Knox family had long been involved with the bank, and both Mr. Knox and his son Northrup headed the bank for many years. The Knox family was one of the bank's most important clients and among the founders of the modern version of the bank. Seymour and Northrup also founded the Buffalo Sabres NHL hockey franchise.

b. The trust provided for discretionary income and principal distributions among Seymour's children and more remote descendants on a per stirpes basis, with the goal of treating Seymour's children equally. The trust was funded with 5,000 shares of Woolworth stock and 5,200 shares of Marine Midland (now HSBC) stock.

c. At the time Mr. Knox created the trust, he was on the board of directors of both Woolworth and Marine Midland and owned 13% of all Woolworth stock. Within a year following the creation of the trust, the trustee sold 2,100 shares of Woolworth stock and purchased other equities. The trustee retained the balance of the stock at Mr. Knox's request. In 1985 the Woolworth stock made up 38.1% of the trust portfolio, which increased to 40.2% by 1996. The concentration was approved by the trustee's regional manager due to the low cost basis of the stock and "the sensitive nature of these issues on this account." In 1991, the trustee wrote to Seymour and recommended the sale of the stock, but said they would continue to hold the stock because "co-trustee" Seymour did not want the stock sold. By 1995, Woolworth was showing signs of trouble and stopped paying dividends. That year, at Seymour's request, the trust invaded principal to make up for the income lost when Woolworth stopped paying dividends, but continued holding a 33.6% concentration of the stock. There was no documentation in the file as to why the stock was retained.

d. Seymour died in 1996. In 1997, Northrup wrote to the trustee and warned against holding Woolworth stock, and informed the trustee that all Woolworth stock in the Knox Foundation had been sold. That year, the trustee sold 5,000 shares of Woolworth stock, leaving 23,000 shares in the trust, making up a 21.1% concentration. That same year, Woolworth was removed from the trustee's "hold list." In 1998, the trustee sold another 3,000 shares. Later that year, the trustee received 20,000 shares of Venator (the successor to Woolworth) stock in an exchange. The trustee did not

fully divest the trust of Woolworth stock until 1999, four years after it stopped paying dividends.

e. When the trust was created, it was also funded with 5,200 shares of Marine Midland stock. The trust agreement expressly authorized the retention of the Marine Midland stock, even if the asset was not otherwise authorized by law as a suitable trust investment and even if the bank was acting as trustee. Internal bank documents stated that Mr. Knox understood that the trustee had complete authority to sell the bank stock for purposes of diversification, and that Mr. Knox was not adverse to the sale but hoped other assets would be acquired rather than the bank stock sold. In 1981, Seymour informed the trustee of his preference to retain the bank stock, and the trustee retained the stock. The only documentation of the annual decision to retain the stock was a literal rubber-stamped entry in the investment diary, with no analysis in the trust files. The bank stock was finally sold in 1987.

f. In 1969, Mr. Knox and Seymour requested that the trustee purchase stock in Dome Petroleum and Leesona Corporation for the trust. The trustee determined these stocks were not good trust investments, but purchased them anyway on the approval of Mr. Knox and Seymour. Despite the trustee's negative conclusions about the Dome stock, it was held in an overweight position (well above 10% of the trust portfolio, and by 1981 as high as 43.4%) at Seymour's direction, whom the bank internally referred to as a "co-trustee" even though he was not actually a co-trustee. Even though Leesona was an off-list security not proper for the trust, the trustee held a concentration in Leesona as high as 30.4% of the trust portfolio on Seymour's authorization. There was no documentation in the file explaining the retention of the overweight position. The trust also retained an overweight position of Digital Equipment stock (as high as 20%) without documentation.

g. In September of 2006, the trustee brought an action in the Surrogate's Court to settle its accounting from 1957 to 2005 and to resign and be discharged as trustee. Seymour's children objected to the accounting and alleged that the trustee negligently retained the Venator Group (the successor to Woolworth) stock. The guardian ad litem appointed for Seymour's minor descendants also filed objections alleging that the trustee breached its duty by failing to diversify investments, violating its own internal procedures in making investments, improperly abdicating its fiduciary role to Mr. Knox and Seymour, and being engaged in an overall pattern of imprudence and negligence.

h. The court held that the trustee breached its fiduciary duty and was negligent in purchasing the Dome and Leesona stock at the direction of a non-trustee (at different times Mr. Knox and Seymour) when the trustee's own analysis concluded those stocks were not proper trust investments. On critical management issues, the court concluded that the trustee simply deferred to Mr. Knox and Seymour, even to the extent of allowing one or both of them to effectively override the best consideration of the sole trustee.

i. With respect to the Woolworth stock, the court held that the trustee should have sold the stock when it became an off-list holding in 1997 at the latest, and that the trustee offered no plausible explanation for its gross dereliction of its fiduciary duty. The court rejected the trustee's defense that the stock produced one-third of the trust's income because there was no documentation of that rationale during the administration, other stocks

could have generated more income, and the stock was retained by the trustee after it stopped paying dividends. The court was also sharply critical of the trustee's distribution of principal to make up for the lost Woolworth dividends, without any analysis and simply at Seymour's request.

j. With respect to the bank's stock, the court held that: (1) the trust instrument exonerated the trustee for holding its own stock, but only where it exercised its discretion with respect to the stock; and (2) since there was no proof that the trustee performed any actual analysis about the prudence of holding the stock and ignored its fiduciary duties, the trustee could not be absolved of it negligence by the trust terms.

k. The court held that the trustee negligently managed the trust by: (1) failing to maintain documentation; (2) failing to develop an investment plan; (3) being indifferent to bank policies; (4) acquiescing to directions by a non-trustee and treating Seymour as a co-trustee; (5) failing to sell the bank stock at the inception of the trust; and (6) failing to sell 90% of the Woolworth stock at the inception of the trust and the balance of the shares by 1991.

l. In a supplemental decision concerning damages against the trustee, the court: (1) used a straightforward application of the *Matter of Janes* method of calculating damages; (2) awarded 9% interest compounded annually, finding that a 9% return would have been earned by the trust assets if invested properly; (3) awarded actual damages in the amount of $21,437,084; (4) declined to order the trustee to return commissions due to a lack of evidence of malevolence or dishonesty; and (5) reserved decision about the trustee's attorneys' fees.

m. On appeal, the Appellate Division largely reversed the surrogate on the following grounds:

(i) The trust terms gave the trustee the power to invest without regard to diversification.

(ii) The trust terms allowed the trustee to consult with "counsel" and provided that the trustee would be protected for acting in good faith in accordance with the opinion of counsel. This provision is not an absolute exoneration provision that is contrary to law.

(iii) The term "counsel" is not limited in the trust terms to only legal counsel.

(iv) The trustee acted prudently on consulting with Seymour in making investment decision because Seymour (a) was co-trustee of other family trusts, (b) had a vested interest in the success of the trust for his children, and (c) was a knowledgeable and savvy investor.

(v) The retention of the bank stock was specifically authorized by the trust terms.

(vi) Dome and Leesona were purchased and held in reliance on advice from Seymour, and to the extent they were sold for losses the losses were nominal. There was no evidence that the trustee acted imprudently in relying on Seymour's advice, and no evidence that Seymour was

acting against the interest of his children or that he was uneducated in financial matters.

(vii) Even though assets were held in overweight positions, the objectant failed to establish that it was imprudent to do so, those positions were held in consultation with Seymour, and the objectant failed to show a financial loss from the holdings.

(viii) The Woolworth and bank stocks were inception assets, and inception assets may be prudently retained even where it might be imprudent to purchase those assets during the administration. Those stocks also generated significant income for the beneficiaries. It would be unreasonable to find that a trustee acted imprudently in retaining assets that had both appreciated in value and provided significant income to the trust.

n. The appellate division sustained the surcharge award only as to the retention of the Woolworth stock after the date it stopped paying dividends.

4. ***Hastings v. PNC Bank, N.A.*, 2012 Md. LEXIS 614 (September 27, 2012).** A sharply divided Maryland Court of Appeals finds that a corporate trustee may request that the trust beneficiaries execute a broad release and indemnification agreement before receiving trust distributions.

a. Marion Brevard died in 2002, and under his will created a trust for the lifetime benefit of his sister, Reba, with Mercantile Safe Deposit and Trust Company as trustee. Upon Reba's death in 2007, the trust terms provided for the outright distribution of the remaining trust assets to four collateral heirs, namely Barbara Hastings, Cort Kirkwood, Ann Robinson, and Robert Kirkwood. Marion's executor did not prepay state inheritance taxes for the trust, so those taxes were owed upon the trust termination. PNC Bank, as successor to Mercantile and trustee, filed and paid the deferred inheritance taxes.

b. The trustee then sent the beneficiaries an accounting for the trust along with a release agreement, and a cover letter requesting that the beneficiaries sign the release agreement (in lieu of court approval of the trustee's accountings) and stating that upon receipt of the signatures the trustee would be in a position to distribute the trust assets. The terms of the release agreement included the following release and indemnification provisions:

> *Each of the [beneficiaries] [r]eleases, indemnifies and holds PNC, in its corporate capacity and as Trustee, harmless from and against any and all losses, claims, demands, surcharges, causes of action, costs and expenses (including legal fees), which may arise from its administration of the Trust, including, but not limited to, the overall investment strategy of the Trustee, all decisions made and actions taken or not taken with regard to the administration of the Trust, and PNC's distribution of the assets to the Beneficiaries as set forth on the attached schedule.*

c. The husband of one of the beneficiaries, who was a lawyer, objected that the release agreement was too favorable to the trustee and should not be required before distributions, and also alleged that the trustee had overpaid the inheritance tax. The trustee defended its calculation of the inheritance tax, and maintained that the release was not a requirement and that it could

seek the same protections from the court. The trustee made a partial distribution to each of the beneficiaries of $33,000, and predicated final distributions on either a fully executed release agreement or court approval of a final accounting.

d. The beneficiaries (other than Robert) sued the trustee in Maryland circuit court alleging that the trustee breached its duties by allegedly demanding execution of the release agreement, and asked the court to compel distribution of the trust assets. The beneficiaries all sued the trustee over the payment of an alleged $4,300 overpayment of the inheritance tax. The trustee counterclaimed to settle its accountings and be released from liability.

e. On cross motions for summary judgment, the circuit court granted summary judgment for the trustee on the inheritance tax issues, and denied summary judgment for the beneficiaries on all of their claims (the trustee did not seek summary judgment on the releases because it filed a counterclaim to settle its liability). The trustee then filed its inventory and final accounting with the court, and the circuit court approved its accounting, awarded the trustee $20,000 in fees, and discharged the trustee from further responsibility. The court specifically found that the trustee had "requested" rather than "required" the release agreement, and granted summary judgment for the trustee because it could not locate any Maryland law against a trustee requesting a release.

f. The beneficiaries appealed, and the Maryland Court of Special Appeals affirmed the circuit court. The beneficiaries then appealed to the Maryland Court of Appeals.

g. On appeal, a sharply divided court (with four judges in the majority and three in the dissent) affirmed the circuit court's decision with respect to the release agreement on the grounds that: (1) nothing in the trust terms precluded the trustee from exercising whatever authority provided to the trustee by law; (2) Maryland law permits a trustee to request a release; (3) the trustee's duty of loyalty is not absolute, and a trustee may engage in a self-interested course of action so long as the beneficiaries provide valid, informed consent; (4) because the law allows the trustee to take actions that would be a breach of the duty of loyalty without consent, the law must also allow the trustee to ask for that consent without fearing a breach just from the asking for consent; (5) the terms of the release agreement are not so broad as to place the trustee's interests before the interests of the beneficiaries; (6) the terms of the release agreement track closely, although not perfectly, to the terms the trustee could receive in a court order; (7) the law also provides a trustee with a lien against the trust assets for reasonable expenses; (8) because the trustee could obtain releases from the court and possessed a lien against the trust assets for reasonable expenses, the release agreement was not a radical departure from the protections already afforded the trustee under Maryland law; (9) to the extent the release agreement went beyond these rights (i.e. by releasing the trustee in its corporate capacity and providing indemnification for all costs rather than just reasonable costs), those are differences of "degree rather than kind"; (10) the trustee's request for the release agreement was only a request for consent to take a course of action and did not violate the duty of loyalty; and (11) the terms of the release agreement were not so one-sided as to place impermissibly its own interests ahead of the beneficiaries.

h. The majority did not opine on whether the beneficiaries had been provided with full and complete information in connection with the release agreement since that issue was not before the court on appeal. In dicta, the majority cautioned that trustees seeking similar indemnification agreements in the future should provide full information to allow the beneficiaries to make informed decisions. The majority also noted that any release of the trustee in its corporate capacity would not extend to other non-trust services, such as securities brokerage services for placing trades for the trust, since it would be at odds with the duty of loyalty. The majority also noted that, regardless of the terms of the release agreement, as matter of Maryland law, any release agreement would not protect the trustee against liability for fraud, material mistake, or irregularity.

i. A three-judge dissent would have reversed the circuit court on the grounds that: (1) there were material differences between the release agreement and the protections afforded a trustee under state law and therefore were a breach of duty; (2) the majority's decision will encourage more widespread use of "such unlawful releases"; (3) the indemnification provision is far broader than the common law indemnity right of the trustee (including for example, claims against the trust arising from the personal fault of the trustee), and the majority misreads this provision by construing it too narrowly and "at a great cost to all trust beneficiaries"; (4) the trustee sought to expand its protection at the expense of the beneficiaries; (5) the trustee did not provide the beneficiaries with full information explaining their rights or the consequences of their signing the release agreement; and (6) the court should not condone the practice of a bank asking beneficiaries to provide the bank insurance against the bank's own blunders.

j. All of the judges affirmed the circuit court's findings on the inheritance tax calculation.

5. ***Kassner v. Division of Taxation,* 2013 N.J. Tax LEXIS 1 (January 3, 2013)[1].** Undistributed income of a trust created under will of New Jersey domiciliary, but that has an out of state trustee and is administered out of state, is not subject to New Jersey income taxation for out of state income.

a. Fred Kassner, a New Jersey domiciliary, died in 1998 and created trust under his will. In 2006, the trust had a New York trustee and was administered exclusively outside New Jersey. In that year, the trust owned stock in four S corporations. The S corporations owned New Jersey assets and conducted part of their business in New Jersey. The trust did not make distributions to beneficiaries in 2006.

b. The trust filed a 2006 New Jersey fiduciary income tax return, and paid tax on the portion of S corporation income allocated to New Jersey, but not on the balance of the S corporation income.

c. The state Director of the Division of Taxation noticed a deficiency of $192,370 along with interest and penalties, claiming that the trust was taxable on 100% of its undistributed income. The trustee filed a notice of protest, but the Director's final determination imposed the tax on all income on the grounds that the trust

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[1] We realize that January 3, 2013 is not actually part of 2012. Because of the potential importance of the decision, we are considering this case to have been decided on the 368th day of 2012. If Congress can do it, so can we. So there!

held assets in New Jersey (i.e. because the trust held S corporation stock and the S corporations held New Jersey assets). The trustee appealed to the New Jersey Tax Court.

d. Relying on its prior decision in *Pennoyer v. Taxation Div. Dir.*, 5 N.J. Tax 386 (1983), the Tax Court granted summary judgment for the trustee, and held that New Jersey could not impose the tax in this case, on the grounds that: (1) the U.S. Constitution bars New Jersey from taxing the undistributed income of a trust if the trustee, assets, and beneficiaries are located outside New Jersey; (2) simply (and incorrectly) using a New Jersey address on a state tax return does not created sufficient contacts with the state for taxation purposes; (3) the creation of the trust in New Jersey and the resultant jurisdiction of the New Jersey courts does not create sufficient contacts for taxation; (4) the trust was not administered in New Jersey and the trustee is out of state, and therefore New Jersey can only tax undistributed trust income if the trust owned New Jersey assets; (5) owning stock in an S corporation does not mean the trust owns the assets of the S corporation for the purposes of determining contacts with the state, and it is not proper to conflate pass-through taxation with ownership of underlying assets; and (6) there are not sufficient constitutional due process contacts with the state to subject the trust to taxation on its out of state income.

6. ***Giraldin v. Giraldin*, 2011 Cal. App. LEXIS 1222 (September 26, 2011); 2012 Cal. LEXIS 11381 (California Supreme Court 2012).** After the settlor has died and can no longer protect his own interests, the beneficiaries have standing to claim a violation of the trustee's duty to the settlor to the extent that violation harmed the beneficiaries' interests

a. In 2002, William Giraldin established a revocable family trust naming one of his sons, Tim, as trustee. The trust provided for the distribution of net income and discretionary principal to William during his lifetime, and thereafter for the creation of a trust for the benefit of William's wife, with the remainder passing at her death equally to William's four children from a prior marriage, his wife's three children from a prior marriage, and their twin sons, Tim and Patrick. William reserved the right to revoke or amend the trust in writing. William also executed a will leaving his separate property and his share of all community property to his trust, with Tim as executor.

b. Thereafter, William invested $4 million in Tim's company, SafeTzone, through payments to the company from February of 2002 through May of 2003. After the final payment, the company issued stock to William that he then transferred to his trust. At the time of William's death in 2005, the trust's interest in the company was essentially worthless. Four of William's children sued Tim as trustee for breach trust, and Mary petitioned to confirm her community interest in two homes and all of the remaining trust assets. The children objected to Mary's petition arguing that all of the assets were in the trust, and because she accepted trust distributions she could not disavow the trust by claiming a community property interest.

c. The probate court held that Tim breached his duties as trustee by (1) directing the transfer of trust assets to the company to serve his own interests and (2) failing to preserve trust assets and consider the interests of the remainder beneficiaries when making investments. The court also found that William lacked the mental capacity to approve the investment in the company and that the transaction documents signed by William did not amount to a direction by William to make the investment. The probate court surcharged Tim in the

amount of $4,376,044 for the investment in the company and another $625,619 for the other trust disbursements.

d. The probate court also rejected Mary's petition on the grounds that the doctrine of spousal election applied to the trust, and by accepting benefits from the trust she lost her right to pursue community property rights. Tim and Mary both appealed.

e. On appeal, the California Court of Appeals reversed the surcharge against Tim on the grounds that: (1) Tim only owed duties to William during his lifetime and therefore the children lacked standing; (2) remainder beneficiaries have no enforceable property rights in a revocable trust until it becomes irrevocable; (3) the death of the settlor does not grant the remainder beneficiaries retroactive rights; (4) the children could not enforce any duties owed to William because the only beneficiary under the will was the family trust and the claims were not for William's benefit since William authorized the transaction; (5) William retained his rights to the trust since he was not adjudicated to be legally incompetent and did not restrict his own rights by making the trust irrevocable, and that included the right to do "financially risky or downright stupid things"; and (6) by acting as trustee, Tim had not agreed to act as a *de facto* conservator.

f. The court also reversed the decision dismissing Mary's claims on the grounds that: (1) William only transferred his community share of property to the trust; (2) Mary's share was never made subject to the trust; (3) there was no inconsistency between Mary's claim and her acceptance of trust benefits; and (4) the probate court erred by holding Mary was forced to elect between her claim and the trust benefits.

g. The California Supreme Court granted the four children a limited on appeal on the following question:

> When the settlor of a revocable inter vivos trust appoints, during his lifetime, someone other than himself to act as trustee, once the settlor dies and the trust becomes irrevocable, do the remainder beneficiaries have standing to sue the trustee for breaches of fiduciary duty committed during the period of revocability.

h. On appeal, the California Supreme Court (over done dissenting justice) reversed the Court of Appeals and found that the remainder beneficiaries have standing on the following grounds: (1) the California Probate Code does not address the issue directly; (2) standing is implicit in other provisions of the Code that (a) state that the remainder beneficiaries' interest in a revocable trust is only postponed until after the settlor's death and (b) exonerate a trustee of a revocable trust from liability where acting at the direction of the settlor (implicitly showing there could be liability where not acting at the settlor's direction); (3) while not clear, the best reading of the Code on the trustee's duty to account for a revocable trust is that the trustee must account to reminder beneficiaries for actions taken while the trust was revocable but not until after the settlor dies; (3) the Code grants a "beneficiary" statutory standing to petition the court concerning trust affairs or to determine its existence, and does not distinguish revocable trusts; (4) no California court, and no other statute or case, has held there is no standing in this situation; (5) considered *as a whole*, the Code grants the beneficiaries standing to sue for actions of the trustee while the trust was revocable; (6) after the settlor has died and can no longer protect his own interests, the beneficiaries have standing to claim a violation of the trustee's duty to the settlor to the extent that violation harmed the beneficiaries' interests;

(7) other causes of action, such as for elder financial abuse or a claim by the settlor's personal representative, do not purport to replace or preclude other causes of action and the standing of the personal representative is not exclusive; (8) beneficiaries do not need to go through the two-step process of moving to appoint a personal representative (or an independent one) and then having that personal representative sue, the beneficiaries may bring the actions directly; and (9) after the settlor's death, the beneficiaries have standing to assert a breach of the fiduciary duty the trustee owed to the settlor to the extent that breach harmed the beneficiaries.

i. The California Supreme Court expressed no view on the merits of the claims or whether they were barred by the statute of limitations or *laches*.

j. The dissenting justice would have affirmed the Court of Appeals on the grounds that only the settlor's personal representative can sue on behalf of the settlor.

7. ***Carter v. Carter*, 2012 Ill. App. LEXIS 84 (Feb. 7, 2012).** Court affirms dismissal of surcharge claim against surviving spouse for investing marital trust assets as trustee in municipal bonds to increase her own income distributions from trust.

a. Luther Reynolds Carter Jr. created a living trust that, upon his death in 2003, created three separate trusts, including a marital trust. Luther's wife, Audrey Carter, was the sole trustee of the marital trust. The terms of the marital trust directed that Audrey was to receive all income from the trust but none of the principal. Upon Audrey's death, the remainder of the marital trust was to pass to Luther's daughter, Tiffany Carter. Tiffany was Audrey's stepdaughter.

b. Following Luther's death, Audrey invested the entire principal of the marital trust in municipal bonds. The terms of the marital trust gave the trustee broad discretionary investment powers and specifically permitted the trustee "to invest in bonds, common or preferred stocks … of any investment company … regardless of diversification." Tiffany sued her stepmother, alleging breaches of the duty of impartiality, duty of prudent investment, duty to properly manage trust assets and duty to preserve trust property.

c. On the parties' cross-motions for summary judgment, the trial court granted summary judgment in favor of Audrey. On appeal, Tiffany contended that the trial court misinterpreted Luther's intention for creating the marital trust and she urged the appellate court to find that Audrey was prohibited from investing only in municipal bonds by the common law fiduciary duties of impartiality and prudence and the provisions of Illinois' prudent investor rule.

d. The Illinois Court of Appeals rejected Tiffany's arguments and affirmed the trial court on the grounds that: (1) under the clear terms of the martial trust, Luther intended that all income payments were to go to Audrey during her lifetime; (2) the trust instrument authorized the trustee to invest in property "regardless of diversification" and Luther intended Audrey to be able to generate income for her benefit from nearly any investment; (3) no language in the marital trust required Tiffany's remainder interest to be protected against the effects of inflation; (4) even though Audrey's investment strategy of investing only in municipal bonds could cause the principal of the marital trust to erode due to inflation, Audrey's strategy was nevertheless consistent with Luther's intent in creating the marital trust; (5) Illinois' prudent investor rule permits the rule to be "expanded, restricted, eliminated or otherwise altered" by a trust instrument; and (6) Luther expressly gave Audrey the authority to make investments without

regard to diversification and therefore specifically altered the requirements of the prudent investor rule.

8. ***Bellamy v. Langfitt et al.*, 2012 Fla. App. LEXIS 1543 (Feb. 8, 2012).** Court cannot reform a trust to eliminate corporate co-trustee directly contrary to settlor's intent and trust terms.

   a. Robert Bellamy created a trust in 1982 that he also subsequently amended. Following his death in 2006, the remaining co-trustees were his wife; his wife's adult daughters from a previous marriage, named Langfitt and McMerty; his accountant, Kathryn Posten; and Northern Trust as corporate trustee. The trust instrument provided that a corporate co-trustee would serve at all times after the settlor's death. The trust provided for cash gifts and for the creation of two sub-trusts, a family trust and a grandchildren's trust.

   b. In 2009, Langfitt petitioned to remove the accountant as co-trustee for breach of fiduciary duties. While this petition was pending, the co-trustees drafted proposals pertaining to the administration and distribution of the trust assets among the trusts. Northern Trust, Mrs. Bellamy and Ms. Posten voted to adopt several proposals that were opposed by the adult daughters. In July 2010, the adult daughters entered into a settlement agreement with Ms. Posten, allowing her to resign as trustee and releasing her from liability. Despite Mrs. Bellamy's opposition, the trial court approved the settlement agreement.

   c. In January 2011, the adult daughters and Northern Trust entered into a settlement agreement, subject to court approval, that discharged and released Northern Trust as corporate trustee and provided that Merrill Lynch would act as custodian to receive and hold the income from the trust and pay the trust expenses. The adult daughters then filed a joint petition for approval of the settlement agreement and the discharge of Northern Trust as corporate trustee.

   d. Mrs. Bellamy answered the suit, requesting that a corporate successor trustee be appointed and seeking damages against Northern Trust, alleging that it had breached its fiduciary duties by entering into the settlement agreement and by requesting that the court modify the trust to allow for a corporate custodian rather than a corporate trustee to serve in its place.

   e. The trial court entered an order granting the joint petition approving the settlement agreement as fair and reasonable and in the best interests of the trust, Mr. Bellamy's estate, the sub-trusts and the beneficiaries. The trial court also approved Northern Trust's resignation and discharge as trustee and authorized Northern Trust to transfer the trust assets to Merrill Lynch to serve as custodian. In approving the settlement agreement, the trial court found that modification of the trust in favor of a custodian over a corporate trustee was permissible because the purpose of the corporate trustee was no longer served because the trust was substantially administered, the court had determined the issues regarding funding of the sub-trusts and both sides of the dispute over the funding of the sub-trusts were represented by counsel. Lastly, the trial court dismissed Mrs. Bellamy's complaint with prejudice, finding that the claim for removal of Northern Trust was moot and that Northern Trust had not breached its fiduciary duties by entering into the settlement agreement with the adult daughters. Mrs. Bellamy appealed.

   f. On appeal, the Florida Court of Appeals agreed with Mrs. Bellamy and reversed and remanded the case on the grounds that: (1) the direction that there always be a corporate trustee after the settlor ceased to serve and the provisions requiring

replacement after any resignation reflected the settlor's determination that a corporate trustee was essential to the administration and distribution of trust assets; (2) Mr. Bellamy had specifically addressed and prohibited judicial modification of the trust even as allowed by statute and even if a court found modification to be in the best interests of the beneficiaries; (3) accordingly, the trial court had impermissibly modified the trust contrary to the terms of the trust instrument expressing the settlor's intent; (4) a custodial arrangement in lieu of a corporate trustee was not appropriate because the trust had not been fulfilled and more than routine ministerial functions remained; and (5) although Mrs. Bellamy had agreed to Northern Trust's resignation, she did not agree to excuse Northern Trust from its duty to provide a final accounting or release it from liability, if any.

9. ***Nederlander, et al. v. Papiano*, 2012 Cal. App. Unpub. LEXIS 1717 (March 6, 2012).** Lawyer serving as trustee surcharged for distributing assets pursuant to trust amendments that affected partial revocation requiring consent of co-trustees, and double damages awarded for bad faith in allowing amendments in order to extract payment of lawyer's fees out of the trust assets.

    a. Neil Papiano, a lawyer, served as co-trustee, along with Wells Fargo, of two trusts created by Scott Nederlander for the benefit of Scott's minor daughters. Scott retained the power to revoke each trust so long as the independent trustee consented to the revocation. The trust terms also permitted Scott to amend each trust, but the amendment provision did not explicitly require the consent of the independent trustee.

    b. Over the course of several years, Scott amended the trusts eight times to allow him to withdraw cash from the trusts. Scott's aggregate withdrawals over a three year period totaled $1,770,000. The withdrawals were deposited into a separate irrevocable trust with Scott as beneficiary and Neil as trustee. Neil, acting as co-trustee of the daughter's trusts, conditioned Scott's withdrawals from the trusts on Scott paying legal bills owed to Neil's law firm totaling $240,000.

    c. Scott's daughters sued Scott, Wells Fargo, and Neil in connection with the withdrawals from the trusts for their benefit. Scott and Wells Fargo settled leaving only Neil's liability to the trusts at issue.

    d. The trial court determined that since the daughters' trusts could only be amended with the consent of the trustees, Neil owed a fiduciary duty to the daughters that he breached by allowing the trust amendments. The court offset the damages owed by Neil by the settlement payments made by Scott and Wells Fargo, and assessed damages against Neil in the amount of $191,500 for each trust. The court also held that Neil acted in bad faith by allowing funds from the daughters' trusts to be distributed for Scott's personal legal fees that were not a benefit to the daughters' trusts and assessed an additional $100,000 in damages against Neil for each trust.

    e. On appeal, the California Appellate Court affirmed the trial court on the grounds that: (1) the amendments affected partial revocations that required the trustees' consent; (2) conditioning Scott's revocation of the trusts on the consent of the trustees granted present rights to the daughters as trust beneficiaries; (3) the trustee was obligated to protect the beneficiaries' rights; (4) Neil breached his fiduciary duties to the beneficiaries by permitting Scott to make the withdrawals from the trusts for the benefit of Scott and Neil's law firm; (4) Neil acted in bad faith by injecting "his own personal interest ahead of the interests of the

beneficiaries by conditioning the withdrawal of funds on Scott's payment of legal fees" to Neil's firm; and (5) by California statute, an award for bad faith requires double damages and therefore the court doubled the damage award against Neil.

10. ***Estate of Ehrlich*, 427 N.J. Super.64 (2012)**. Uniform Probate Code in New Jersey allows probate of unsigned copy of will.

    a. N.J.S.A.3B:3-3, is virtually identical to Section 2-503 of the Uniform Probate Code, and states:

    > Although a document or writing added upon a document was not executed in compliance with Section 5–502, the document or writing is treated as if it had been executed in compliance with that Section if the proponent of the document or writing establishes by clear and convincing evidence that the decedent intended the document or writing to constitute (i) the decedent's will....

    b. The purpose of the statute is to avoid harmless errors in the formalities of Will execution. The majority applied the statute to save an unsigned, unwitnessed, copy of a document labeled Last Will and Testament. The opinion recites theses facts:

    > Richard Ehrlich, a trust and estates attorney who practiced in Burlington County for over fifty years, died on September 21, 2009. His only next of kin were his deceased brother's children — Todd and Jonathan Ehrlich and Pamela Venuto. The decedent had not seen or had any contact with Todd or Pamela in over twenty years. He did, however, maintain a relationship with Jonathan, who, he had told his closest friends as late as 2008, was the person to contact if he became ill or died, and to whom he would leave his estate.
    >
    > Jonathan learned of his uncle's death nearly two months after the passing. An extensive search for a Will followed. As a result, Jonathan located a copy of a purported Will in a drawer near the rear entrance of decedent's home, which, like his office, was full of clutter and a mess. Thereafter, on December 17, 2009, Jonathan filed a verified complaint seeking to have the document admitted to probate. His siblings, Todd and Pamela, filed an answer, objecting. The court appointed a temporary administrator, Dennis P. McInerney, Esquire, who had been previously named as Trustee of decedent's law practice, and by order of June 23, 2010, directed, among other things, an inspection of decedent's home. Pursuant to that order, on July 8, 2010, Jonathan, Todd and Pamela, along with counsel and McInerney, accessed and viewed the contents of decedent's home and law office. No other document purporting to be decedent's Will was ever located.
    >
    > The document proffered by Jonathan is a copy of a detailed fourteen-page document entitled "Last Will and Testament." It was typed on traditional legal paper with Richard Ehrlich's name and law office address printed in the margin of each page. The document does not contain the signature of decedent or any witnesses. It does, however, include, in

> decedent's own handwriting, a notation at the right-hand corner of the cover page: “Original mailed to H.W. Van Sciver, 5/20/2000[.]” The document names Harry W. Van Sciver as Executor of the purported Will and Jonathan as contingent Executor. Van Sciver was also named Trustee, along with Jonathan and Michelle Tarter as contingent Trustees. Van Sciver predeceased the decedent and the original of the document was never returned.
>
> In relevant part, the purported Will provides a specific bequest of $50,000 to Pamela and $75,000 to Todd. Twenty-five percent of the residuary estate is to pass to a trust for the benefit of a friend, Kathryn Harris, who is to receive periodic payments therefrom. Seventy-five percent of the residuary estate is to pass to Jonathan.
>
> It is undisputed that the document was prepared by decedent and just before he was to undergo life-threatening surgery. On the same day this purported Will was drafted—May 20, 2000—decedent also executed a Power of Attorney and Living Will, both witnessed by the same individual, who was the Burlington County Surrogate. As with the purported Will, these other documents were typed on traditional legal paper with Richard Ehrlich's name and law office address printed in the margin of each page.
>
> Jonathan is named the alternate agent to make health care decisions in the event his uncle became incapacitated and the primary agent was unavailable.
>
> Years after drafting these documents, decedent acknowledged to others that he had a Will and wished to delete the bequest to his former friend, Kathryn Harris, with whom he apparently had a falling out. Despite his stated intention, decedent never effectuated any change or modification to his Will as no such document ever surfaced, even after the extensive search conducted of his home and law office after his death.

c. In applying the statute the court concluded the document was simply a copy of the decedent’s Will:

> Clearly, decedent's handwritten notation on its cover page evidencing that the original was sent to the executor and trustee named in that very document demonstrates an intent that the document serve as its title indicates—the “Last Will and Testament” of Richard Ehrlich. In fact, the very same day he sent the original of his Will to his executor, decedent executed a power of attorney and health care directive, both witnessed by the same individual. As the General Equity judge noted, “[e]ven if the original for some reason was not signed by him, through some oversight or negligence his dated notation that he mailed the original to his executor is clearly his written assent of his intention that the document was his Last Will and Testament.”

> Lest there be any doubt, in the years following the drafting of this document, and as late as 2008, decedent repeatedly orally acknowledged and confirmed the contents therein to those closest to him in life. The unrefuted proof is that decedent intended Jonathan to be the primary, if not exclusive, beneficiary of his estate, an objective the purported Will effectively accomplishes. Indeed, the evidence strongly suggests that this remained decedent's testamentary intent throughout the remainder of his life.
>
> Moreover, decedent acknowledged the existence of the Will to others to whom he expressed an intention to change one or more of the testamentary dispositions therein. As the wife of decedent's closest friend recounted: "And [Richard] has to change [the Will] because there is another person that he gave, I don't know how you say it, annuities every month ... in case he passed away, and he wants to take her off the [W]ill. And by that time Richard could barely write or sign, so I'm not surprised he didn't sign his [W]ill." Although there is no evidence whatsoever that decedent ever pursued this intention, the very fact that he admitted to such a document is compelling proof not only of its existence but of decedent's belief that it was valid and of his intention that it serve as his final testamentary disposition.
>
> Given these circumstances, we are satisfied there is clear and convincing evidence that the unexecuted document challenged by appellants was reviewed and assented to by decedent and accurately reflects his final testamentary wishes. As such, it was properly admitted to probate as his Last Will and Testament.
>
> The fact that the document is only a copy of the original sent to decedent's executor is not fatal to its admissibility to probate. Although not lightly excused, there is no requirement in Section 3 that the document sought to be admitted to probate be an original. Moreover, there is no evidence or challenge presented that the copy of the Will has in any way been altered or forged.

d. A dissent argued that this was not a harmless error case at all but rather a lost Will case:

> Despite Jonathan Ehrlich's reliance upon N.J.S.A. 3B:3–3 in seeking to probate the unexecuted copy of the decedent's will found after his death, Jonathan does not appear to claim that the decedent actually intended that document to be his will, as required for probate under N.J.S.A. 3B:3–3. Instead, Jonathan's claim appears to be that the will found in the decedent's home was an unexecuted copy of an original executed will, which the decedent sent to his executor Van Sciver, and that the original was lost by Van Sciver or Van Sciver's estate after his death. For the reasons previously discussed, N.J.S.A. 3B:3–3 does not address such a claim.

> In my view, Jonathan is entitled to prevail only if he can show, in conformity with the common law authority dealing with lost wills, that the unexecuted will found in the decedent's home is a copy of an original executed will sent to Van Sciver, which was lost and not revoked by the decedent. However, because this case was presented solely under N.J.S.A. 3B:3–3, the trial court did not make any findings of fact regarding these issues. Indeed, the trial court concluded that the copy of the will found in the decedent's home could be admitted to probate under N.J.S.A. 3B:3–3 "[e]ven if the original ... was not signed by [the decedent]." Therefore, I would remand to the trial court to make such findings. I would not preclude the parties from moving to supplement the record to present additional evidence on the question whether the unexecuted copy of the will found in the decedent's home may be admitted to probate as a copy of the alleged executed original sent to Van Sciver.

11. ***Church of the Little Flower v. U.S. Bank,* 2012 Ill. App. LEXIS 905 (2012).** Termination of perpetual charitable trust rejected on the grounds that equitable deviation is not allowed just because it would be more advantageous to the beneficiaries.

    a. Erma Donelan created a trust in 1991. At her death, the trust provided for the distribution of $700,000 to charity, and for a 7% unitrust to her sisters-in-law for their lives, followed after their deaths a perpetual charitable trust to distribute the income annually to three charities in unequal shares, with the Church of the Little Flower receiving 20% of the annual income. The last of Erma's sisters-in-law died in 2005. To comply with tax regulations, the trust was modified to annually distribute to the charities the amount required annually under Internal Revenue Code section 4942.

    b. From 2006-2010, the trustee's compensation exceeded the amount of the 20% share of income paid to the Church. In 2010, the Church sued under *cy pres* to compel termination of the trust, on the grounds that paying the trustee more than the Church frustrated the settlor's purpose of giving money to charity. The Church also brought its claim for termination under the doctrine of equitable deviation, arguing that the trustee's fees were unanticipated circumstances that justified termination to further the trust's actual purposes.

    c. The other charities consented to the termination of the trust, and the state attorney general supported the termination by letter to the court, but did not make an appearance in the case.

    d. The trial court granted summary judgment for the Church and order termination under equitable deviation, holding that the trustee's fees interfered with the trust's charitable purposes.

    e. On appeal, the Illinois Court of Appeals reversed the trial court on the grounds that: (1) the court's role is to give effect to the settlor's intent; (2) charitable trusts are viewed with favor by the courts; (3) the purpose of equitable deviation is to carry out the setttlor's intent where there are unanticipated circumstances; (4) if the trustee's fees were unreasonable, the beneficiaries would have other causes of action rather than seeking termination; and (5) equitable deviation is not allowed just because it would be more advantageous to the beneficiaries.

12. ***Beim v. Hulfish*, 2012 WL 1912261 (N.J. Super 2012)**. Loss of prospective inheritance allowed as potential damages in wrongful death action.

   a. In 2008 a 97 year old man, whose wife had died years before, was injured in a car accident and subsequently died. His heirs alleged that had he survived until 2009 his estate taxes would have been lower. A New Jersey appellate court has said that the lower taxes may be considered as part of the damages in a wrongful death action:

> Without impinging upon the creativity and imagination of counsel, we could expect the parties to offer expert opinions in the fields of medicine and economics to illuminate life expectancy and mortality issues. Cf. R. 1:13-5 (providing that the table of mortality and life expectancy in the Rules' Appendix "shall be admissible in evidence as prima facie proof of the facts therein contained"); see also Marendino v. Spitz, 121 N.J.L. 556, 558 (E. & A. 1938) (recognizing the utility of mortality tables but not requiring their use in the estimation of life expectancy in wrongful death actions). Additionally, accounting-related opinions could be mustered to explain taxation issues. This catalog of disciplines is for illustrative purposes only and is not intended to represent a minimum threshold or a maximum limit upon what could be made available to assist the jury in determining "such damages as they shall deem fair and just with reference to the pecuniary injuries resulting from such death." N.J.S.A. 2A:31-5.
>
> There is nothing in this case that engenders unacceptable conjecture or speculation about the estate tax structure. In wrongful death cases, we tolerate relaxed evidentiary standards with respect to proof of damages. See Lesniak v. Cnty. of Bergen, 117 N.J. 12, 27 (1989) (using analogy from wrongful death jurisprudence to ease elements of proof of loss of future income by an injured infant); see also Green, supra, 85 N.J. at 15-17 (allowing damages in wrongful death cases, even though the inferences, and estimate of damages, are based on uncertainties). We harbor no fears that a properly instructed jury will produce a verdict that is based upon mere speculation.
>
> Understandably, at the time of defendants' motion, the Law Division could confidently state that if Mr. Kellogg had lived to his actuarial life expectancy beyond 2010 there would be no damages under plaintiffs' theory. This, however, did not eliminate a plausible argument that Mr. Kellogg might have perished in either 2009 or 2010, but plaintiffs were never allowed to proffer such evidence, even if it could have been assembled. However, at the time of the reconsideration motion, the law had changed, and the estate tax structure through 2012 was now known. Since it was probable but not impossible that Mr. Kellogg might not have survived beyond 2012, virtually all of the perceived uncertainty in the case was eliminated. Nevertheless, we do not discount the possibility that Mr. Kellogg could have lived into 2013,10 and subject to defendants' evidence of an otherwise hale and hearty Mr. Kellogg, they would not be precluded from arguing to a jury that his death would have happened later in the future, at a time when the estate tax consequences were either the same or even worse than in 2008.

B. **THE RUNNERS UP.**

1. ***Amend v. Astrue*, 284 Neb. 691 (Nebraska Supreme Court 2012).** A child, conceived after his biological father's death through intrauterine insemination using his sperm and born within 9 months of his death, cannot inherit from his father as his surviving issue under current Nebraska intestacy law.

2. ***Beckwith v. Dahl,* 205 Cal. App. 4th 1039 (2012).** California recognizes the tort of intentional interference with an expected inheritance.

3. ***Matter of Hunter*, 2010 NY Slip Op 50548U (March 31, 2010); 2012 N.Y. App. Div. LEXIS 8093 (November 28, 2012).** Surrogate surcharges trustee for losses in value of 100% concentration of Kodak stock. Appellate division affirms the surcharge.

4. ***U.S. v. Eversoff*, 2006 U.S. Dist. LEXIS 69575 (EDNY 2006); Vacated remanded by 270 Fed. Appx. 75, 2008 U.S. App. LEXIS 5952, 101 A.F.T.R.2d (RIA) 1406, 2008-1 U.S. Tax Cas. (CCH) P50240 (2d Cir. 2008); on remand 2012 U.S. Dist. LEXIS 60344, 109 A.F.T.R.2d (RIA) 1957, 2012-1 U.S. Tax Cas. (CCH) P50328 (E.D.N.Y. 2012).** Trust ignored for asset protection purposes.

5. ***Beren v. Goodyear,* 2012 COA 203 (Colorado Court of Appeals, 2012).** Divided Colorado Court of Appeals holds that, in protracted probate litigation during which the value of the estate significantly increases, the probate court erred by using its equitable power to make a compensatory increase in the surviving spouse's elective share.

6. ***Penn Mutual Life Ins. Co. v. Greatbanc Trust Co.,* 2012 U.S. Dist. LEXIS 115016 (N.D. Illinois, 2012).** Where trustee of insurance trust admits lack of insurable interest, court allows trustee to pursue claim for refund of premiums under unjust enrichment theory.